

Counting to 500 Under the Families First Coronavirus Response Act

Labor & Employment Law Update

By Peter Hansen on March 26, 2020

As many of you know, employers with 500 or more employees are exempt from the Emergency Family and Medical Leave Expansion and the Emergency Paid Sick Leave provisions of the Family First Coronavirus Response Act (FFCRA). Now that the Department of Labor (DOL) released FAQs regarding the FFCRA, we know a bit more about how the DOL will count employees for the purpose of meeting the 500 employee threshold – including that it will apply the Fair Labor Standards Act's (FLSA) joint-employer analysis and the Family and Medical Leave Act's (FMLA) integrated employer test in making that determination. Now seems like as good a time as any for a brief refresher on the two tests.

FLSA Joint Employer Analysis

Under the FLSA, separate companies may become joint employers of an employee if both companies exercise control over the same employee. For example, say two companies benefit from an individual's work but only one company designates the individual as their employee. To determine whether the two companies are the individual's joint employer, the DOL would consider whether the second company exercises significant control over the employee's work, including whether the second company:

- hires or fires the employee;
- supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
- determines the employee's rate and method of payment; and
- maintains the employee's employment records.

Employers with 500 or more employees under the above FLSA joint employer analysis are not subject to either the FFCRA's paid sick leave or paid FMLA leave provisions.

FMLA Integrated Employer Test

Under the FMLA, separate companies may be considered to be part of a single employer if they are an "integrated employer," determined by considering the following factors:

- The companies share common management;
- The companies' operations are interrelated;
- The companies share control of labor relations; and
- The companies share common ownership and/or financial control

Employers with 500 or more employees under the FMLA's integrated employer test are not subject to the FFCRA's paid FMLA leave provision – but, unless they have 500 or more employees under the FLSA's joint employer analysis, may still be subject to the paid sick leave provision.

Each of the above tests are complicated, and the FFCRA remains subject to pending DOL guidance and regulations. As a result, any employers with questions or concerns regarding their joint employer or integrated employer status – or anything else relating to the FFCRA – should consult with counsel.

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